SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-553

NOLAN D. NEGAARD and PALMDALE HOMEOWNERS ASSOCIATION,

Petitioners,

vs.

DEPARTMENT OF AERONAUTICS OF THE STATE OF CALIFORNIA and THE CITY OF LOS ANGELES,

Respondents.

Answer of Respondent, City of Los Angeles, to Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

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DEPARTMENT OF AERONAUTICS OF THE STATE OF CALIFORNIA and THE CITY OF LOS ANGELES,

Respondents.

Answer of Respondent, City of Los Angeles, to Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

Respondent, City of Los Angeles, hereby answers Petitioners' Petition for Writ of Certiorari and prays that said Petition be denied.

Statutes Involved.

In addition to the statutes listed by Petitioners on page 2 of the Petition (hereinafter referred to as "P" for citation purposes) there is *California Public Utilities Code,* Section 21663. Other pertinent code sections are 4 *California Administrative Code,* Section 3531 and 4 *California Administrative Code,* Section 3535. These are set forth in full in Appendix A hereto and judicial notice of such are hereby requested.

Statement of the Case.

The City of Los Angeles (hereinafter referrred to as "City") plans to construct and operate the Palmdale Intercontinental Airport (hereinafter referred to as "Airport") in the Antelope Valley, which is in the north part of Los Angeles County.

In order to operate an airport in California, state law requires that the airport operator have an airport permit (*Public Utilities Code*, Section 21663) (see Appendix A). The California State Aeronautic's Act gives the State Department of Aeronautics (hereinafter referred to as "Department") the power to issue said permits (*Public Utilities Code*, Section 21666) (see "P"—Appendix C, p. 15). The Department also has the power to grant site approvals and said grant can be subject to conditions imposed thereon (*Public Utilities Code*, Section 21666).

The site approval permit is the initial grant by the Department. It allows for the development of the airport. An airport permit is issued upon completion of the airport in accordance with terms of the site approval permit (4 *Cal. Admin. Code* 3531(c)) (see Appendix A). If the conditions specified on the site approval permit have been met, the airport permit shall be issued allowing the airport to be opened for operation (*Cal. Admin. Code* 3535(a)). Any affected or interested person may request, and the Department shall hold upon such request, a public hearing in connection with the issuance of an airport permit (*Public Utilities Code*, Section 21665) (see "P"—Appendix C, p. 15).

The airport permit is only to be issued upon the conditions imposed on the granting of site approval

being met and petitioners, if affected, or any interested parties, are entitled to a public hearing to determine if such conditions have been met (*Public Utilities Code*, Section 21665). If the airport permit is then granted, the operator must comply with the conditions imposed by the Department (*Public Utilities Code*, Section 21-668).

City applied for site approval for the Airport which approval was granted by the Department. No airport permit has been applied for, as of yet, by City and, consequently, none has been granted. The decision granting site approval was effective August 4, 1969, (see "P"—Appendix A, p. 2) and the Petitioners then had 30 days, or until September 3, 1969, to seek judicial review of the administrative decision pursuant to *California Government Code*, Section 11523 (see "P"—Appendix C, p. 12). Review was sought by Petitioners pursuant to *California Code of Civil Procedure*, Section 1094.5 (see "P"—Appendix C, p. 13). Petitioners did not seek review until October 6, 1969, when they filed their "Petition for Writ of Mandamus" (C.C.P. see 1094.5) (see "P"—Appendix A, p. 2) in the Los Angeles County Superior Court. Respondent City and Department demurred to the State Petition for Writ of Mandamus on the ground, among others, that the State Petition was barred by the applicable statute of limitations, namely, *California Government Code*, Section 11523. The demurrers were sustained with leave to amend. The State Petition was amended and demurrers, filed to it, were sustained by the trial court without leave to amend. The California Court of Appeal affirmed the trial court and the California State Supreme Court denied a petition for hearing.

I.

The California Act Authorizing the Granting of Airport Site Approval Provides That Conditions May Be Attached to Such a Grant.

The site approval was granted subject to three conditions, namely:

1. Relocation of the two parallel sets of the long runways at least 2,000 feet north and at least 4,000 feet east of the location appearing on the application.

2. Approval of safe air traffic patterns by the Federal Aviation Administration.

3. Approval of the zone of approach of the airport by the Federal Aviation Administration.

(See Findings of Fact and Order of Department's Hearing Examiner, which were adapted by Department, attached hereto as Appendix B).

It should be noted that one of the conditions allowed for the relocation of two runways at least 2,000 feet north and 4,000 feet east of the location appearing on the application. This condition did not provide, as Petitioners contend ("P" p. 3, 9 ftn.), that the site itself was to be relocated. Petitioners, on page 9, analogize to Washington National Airport being relocated. The analogy is not exactly appropriate since, as stated, the site approval did not allow for the relocation of the site, but for the runways, and, secondly, the Airport is to be constructed on 17,000 acres of virtually undeveloped desert land, an area in no way comparable to the Washington, D.C., metropolitan area. The weakness

and inaccuracy of this analogy is evidence of the weakness of Petitioners' case. Petitioners' hyperbolical approach was noted by the California Court of Appeals (see "P"—Appendix A, p. 4).

Section 21666 of the *California Public Utilities Code* states in its concluding paragraph (see "P"—Appendix C, p. 16) that the Department (referred to as "division" in the section) "may grant approval of a site subject to any reasonable conditions which it deems necessary to effectuate the purpose of this article."

The conditions stated by the Department's decision were reasonable considering the Federal Government's predominance in the area of air navigation. The California State Aeronautics act, of which *California Public Utilities Code*, Section 21666 is a part, recognizes this.

Section 21240 of the *California Public Utilities Code* (also part of the California State Aeronautics Act) reads:

> "This state recognizes the authority of the Federal Government to regulate the operation of aircraft and *to control the use of the airways, and nothing in this act shall be construed to give the Department of Aeronautics the power to so regulate* and control safety factors in the operation of aircraft or *to control use of the airways." Public Utilities Code*, Section 21240 (emphasis added).

II.

Whether a State Action Was Timely Filed, Pursuant to a State Statute of Limitations, Challenging the Decision of a State Agency, Does Not Present a Federal Question.

Petitioners contend that the state courts ruling frustrated the Federal Aviation Act ("P", p. 8). It is not clear in reading the Petition just how this occurred. It would appear that the Petitioners are straining to present a federal question so as to come within Rule 19(a) of the United States Supreme Court Rules. But just what relief did the Petitioners seek in the state court and what was the nature of the state court's ruling?

Petitioners sought review, by way of a Writ of Mandamus, pursuant to *California Code of Civil Procedure,* Section 1094.5, of the Department's decision granting airport site approval. (see "P"—Appendix A, p. 2). The State Petition was filed by Petitioners nine months before the alleged FAA approval of the runway relocation, the State Petition being filed October 6, 1969 and that particular alleged FAA approval being June 2, 1970 ("P" pp. 3-4). The State Petition was directed against the action and proceeding of the Department. The questions that may be raised by a State Petition for Writ of Mandamus, pursuant to *California Code of Civil Procedure,* Section 1094.5, are whether the Department, as the body who rendered the decision, proceeded without, or in excess of jurisdiction, whether it provided a fair trial or whether there was an abuse of discretion by the Department in some way in its conduct of the proceeding. (see "P"—Appendix C, pp. 13-14). *California Code of Civil Procedure,* Section

1094.5, provides for an attack on the agency rendering the decision. The State Petition was not filed against the Federal Aviation Administration the body who was to approve safe air traffic patterns and the zone of approach. The Department was not going to approve these, nor was it going to further approve, for the purpose of the site approval, the relocation of the runways. The Department's decision was effective August 4, 1969. If Petitioners wanted to attack that decision they had, pursuant to state law, namely, *Government Code,* Section 11523, 30 days to do so which they failed to do.

Accepting Petitioners' argument one could wait until the Federal Aviation Administration had its last say before they need challenge the site approval. This would result in uncertainty in the status of site approvals. Such a rule would be unfair to the recipient of site approval. The California court pointed out the absurdity of this position (see "P"—Appendix A, p. 4). Conversely, Petitioners' argument would mean that the Department's decision could not be challenged until the conditions occurred because, according to Petitioners, not until then is the Department's decision final. It may be years before such Federal approvals are forthcoming. Such a rule, therefore, would also be unfair to those who wished to challenge the site approval. Petitioners allege that the relocation of the runways (they claim the site) was approved June 2, 1970. That is the only condition of the Department's order referred to to make it, it is submitted, appear that it would be reasonable to require one who wishes to challenge the decision wait until the condition occurs. Yet, as pointed out, there were two other conditions which were also imposed which may not have yet oc-

curred. Petitioners conveniently choose to ignore the existence of these additional conditions.

The Petitioners would have the Federal approvals challenged in the state proceedings reviewing the Department's action. But what authority does Petitioners' offer to show that the state courts, in their review of a state agency's action, have the power to set aside, or rule invalid, Federal approvals. In fact, if anything, that, especially in the area of air navigation, would appear to be a violation of the supremacy clause.

The state courts, in interpreting the particular state statute of limitations, ruled that the Petitioners had not timely filed their action to challenge the decision of a state agency. This does not present a federal question. The state courts were not saying that review of the Federal approvals could not be sought by whatever appropriate Federal procedure is available for such. They did say that if you are going to challenge a state agency's action you must do so within the time prescribed by state law.

The City in developing the Airport is bound by the conditions of the Department's decision. The state airport permit would only be issued by the Department to the City if the conditions have been met [4 *California Administrative Code,* Section 3535(a)]. On page 9 of the Petition, Petitioners talk about the FAA being able to compel the building of airports. There is no support for such a statement. Even though the City has received site approval there is no rule which compels it to build the airport.

III.

The Judicial Interpretation Did Not Discriminate Against the Petitioners Since the Department's Decision Was Final.

Petitioners contend that the state court's ruling was discriminatory because it allegedly laid down some different rule when federal activity was involved ("P"—p. 6).

The Department's decision was a final order approving the site for construction of the Airport with certain conditions having to be met before an airport permit would be granted for the operational use of the airport. The rule that conditions can be attached to a final state administrative order, is state law and not limited to administrative orders where Federal activity is involved. The Court of Appeals cited the case of *Ginns v. Savage*, 61 Cal.2d 520, 525 in support of the rule ("P"—Appendix A, p. 2). That case involved a real estate license.

Conclusion.

For these reasons the writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A.

Additional Statutes Involved.

California Public Utilities Code, Sec. 21663.

§21663. *Operation of airport without permit.*

It is unlawful for any political subdivision, any of its officers of employees, or any person to operate an airport unless an appropriate airport permit required by rule of the department has been issued by the department and has not subsequently been revoked.

California Administrative Code, Sec. 3531.

3531. *Site Approval Requirements. (a) Issuance of Site Approval:* The issuance of site approvals by the Department is contingent upon applicant's meeting the requirements of these regulations and obtaining approvals required by other governmental agencies having jurisdiction. The principal items requiring approval clearance or approval are:

(1) Land use approval of local governing body.

(2) Airspace approval by Federal Aviation Administration.

(3) Favorable response to required public notice or resolution of any potential conflict between the proposed airport and other facilities in the area.

(4) Investigation, inspection and clearance by designated representative of the Department.

(5) The advantages to the public in selection of the site outweigh the disadvantages to the environment. Environmental considerations include but are not limited to noise.

(6) The site is adequate for the proposed airport. Any site shall be deemed adequate which meets or exceeds the minimum airport standards approved or recommended by the Federal Government.

(7) The proposed airport, if constructed or established, will conform to minimum standards of safety.

(8) Safe air traffic patterns have been worked out for the proposed airport and for all existing airports and approved airport sites in its vicinity.

(9) The zone of approach of the airport has been engineered in conformity with the provisions of the Public Utilities Code, Section 21403, and is available for public inspection.

(b) The Department may grant approval of a site subject to any reasonable conditions which it deems necessary to effectuate the purposes of these regulations.

(c) Site approvals will be issued for an effective period of one (1) year. Extensions of time will be granted upon application when justified. Site approvals are issued without charge. An airport permit will be issued upon completion of the airport in accordance with terms of the site approval. See Section 3535 below.

California Administrative Code, Sec. 3535.

3535. *Permits. (a) Issuance of Permits:* An airport permit will be issued upon completion of the airport for which site approval has been granted. The proponent shall notify the Department of such completion and request a permit authorizing the airport to be opened for operations. The Department shall inspect

the airport to insure that conditions specified on the site approval have been met. Upon completion of the inspection, if all the conditions have been met, the permit shall be issued.

(b) Terms of Issuance: Airport permits shall be issued by the Department without charge. The permit shall continue in effect so long as the airport meets the conditions set forth on the original site approval and on the permit, and is subject to revocation only under conditions set forth in Article 4 of this regulation. The conditions under which site approvals and permits are issued will be listed on the back of the site approvals and permits when issued.

(c) Changes in Conditions: When there are changes in the use of the airport or changes in the class of the airport, an Amended Site Approval is required. When changes are made which affect conditions which have been imposed upon operation of the airport, an Amended Site Approval is required to remove the conditions or alter them. An application to the Department for an Amended Site Approval must be initiated by the airport when one is required.

(d) Annual Report Required: In order that the Department may maintain accurate records of the physical status of all permitted airports, an annual report will be required on forms prescribed by the Department. The Department will mail forms to all airports in the State (except military) in January of each year. Forms shall be completed and returned to the Department within 30 days.

APPENDIX B.

Findings of Fact and Order of Hearing Officer.

Pursuant to the foregoing findings of fact, the Hearing Officer makes the following determination of issues:

I

The site is adequate for the proposed airport.

II

The proposed airport, if constructed or established, will conform to minimum standards of safety.

III

Safe air traffic patterns can be worked out for the proposed airport and for all existing airports and approved airport sites in its vicinity and subject to approval of air traffic patterns as safe by the Federal Aviation administration this issue is answered in the affirmative.

IV

Provided the zone of approach of the airport is engineered in conformity with the provisions of Section 21403 of the Public Utilities Code and is available for public inspection which requires conformity with the specifications of Part 77 of the Federal Aviation Regulations of the Federal Aviation Administration, Department of Transportation, this issue is answered in the affirmative.

* * *

WHEREFORE, THE FOLLOWING ORDER is hereby made:

The application of respondent City of Los Angeles for site approval of its proposed Palmdale International Airport is hereby granted, subject to the following conditions:

1. Relocation of the two parallel sets of the long runways at least 2000 feet north and at least 4000 feet east of the location appearing on the application.

2. Approval of safe air traffic patterns by the Federal Aviation Administration.

3. Approval of the zone of approach of the airport by the Federal Aviation Administration.

I hereby submit the foregoing which constitutes my Proposed Decision in the above-entitled matter, as a result of the hearing had before me on the above dates, at Palmdale, California, and recommend its adoption as the decision of the Department of Aeronautics.

DATED: July 28, 1969

/s/ George K. Bellows
GEORGE K. BELLOWS, Hearing Officer